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IN THE

Supreme Court of the United States

MICHAEL A. STRAUSS,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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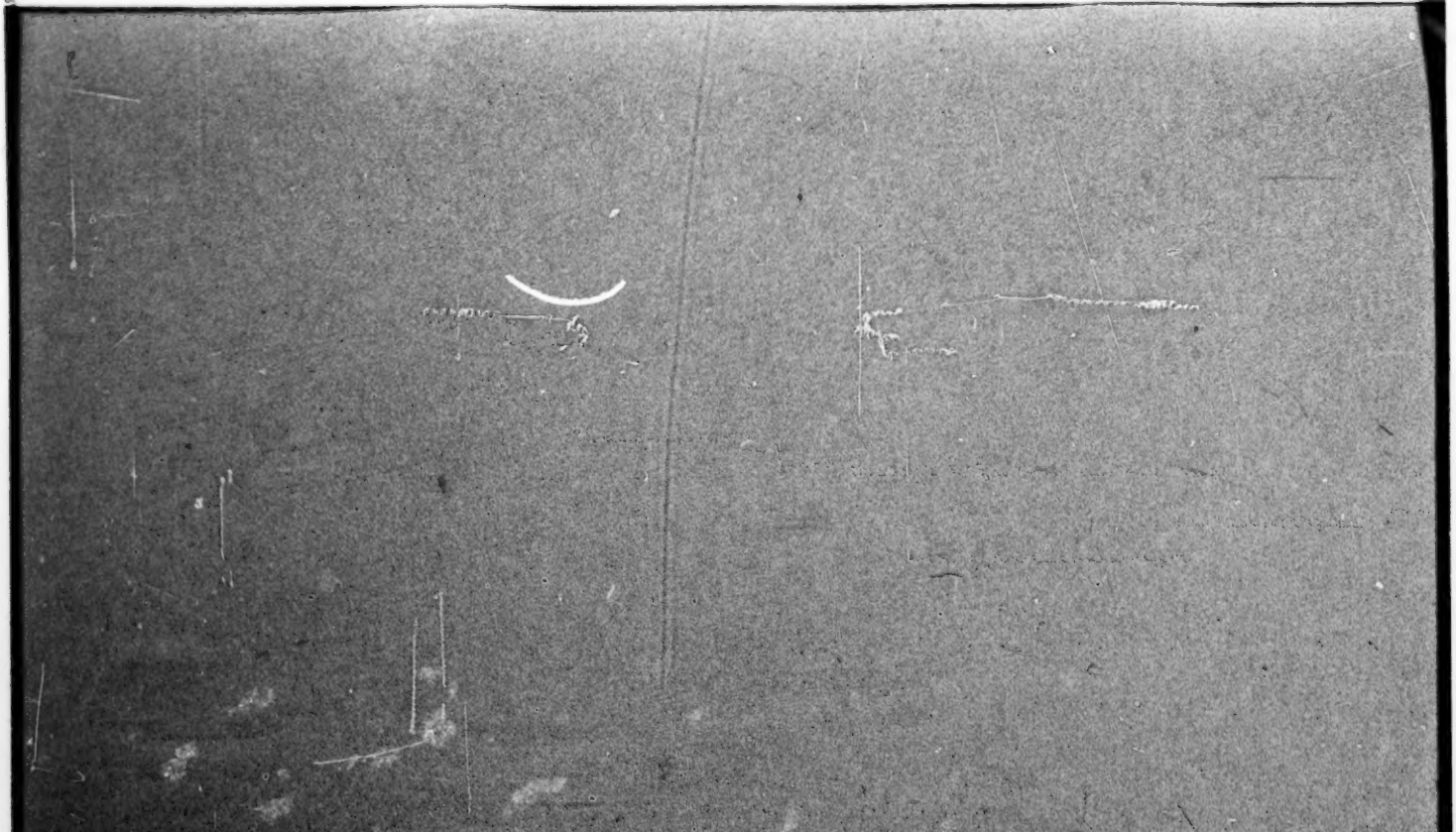

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To the Honorable Supreme Court of the United States:

The Petitioner, MICHAEL A. STRAUSS, hereby petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit was filed January 9, 1975. The decisions of the United States District Court, Southern District of Florida were filed November 21, 30, and December 17, all 1973. Copies of the opinions of the lower courts are included in the Appendix to this Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Appeals was filed on January 9, 1975.

The Jurisdiction of this Court is invoked under Title 28, Section 1254(1), United States Code.

QUESTIONS PRESENTED

1. WHETHER THE FIFTH CIRCUIT ERRED WHEN IT RULED ISSUES MOOT DUE TO APPELLANT'S RELEASE FROM CUSTODY.

STATUTE INVOLVED

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 11, TITLE 18, UNITED STATES CODE:

A defendant may plead not guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such pleas or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea.

SECTION 2255, TITLE 28, UNITED STATES CODE:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed

in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusiviely show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vunerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

Petitioner was indicted along with 21 other individuals on January 24, 1972 for violation of Title 18, United States Code, Sections 2, 371, 1341, 1342, 1343, and 2314.

On March 14, 1972, Petitioner appeared in United States District Court, Southern District of Florida, Honorable Joe Eaton, Judge and entered a plea of guilty and was adjudged guilty as to Count 1 and Counts 24-27 of the indictment, with the other counts being dismissed. At the time of entering the plea, the Court was aware of and openly acknowledged the existence of a plea bargaining agreement entered into between Petitioner and the United States Government represented by Arthur W. Tifford and Richard H. Kirschner, Assistant United States Attorneys, and John F. Brady, Assistant Postal Inspector in Charge, Atlanta Regional Office, United States Post Office Department.

The agreement, dated March 14, 1972, contained eight specific obligations which the Government of the United

States agreed to do, with one of the provisions dealing in the area of parole. The specific provision dealing with parole is #5, and the pertinent portion reads as follows:

> ". . . In any event, the Government will recommend that defendant be paroled on all sentences after serving no more than one-third (1/3) of the sentence imposed by the original Trial Court."

A second portion of the agreement pertinent to this petition reads as follows:

> "Sixth . . . the Government will further recommend a minimum security institution as the place of confinement for the Defendant Strauss."

On October 26, 1972, Petitioner was sentenced by the Honorable Joe Eaton, United States District Court, Southern District of Florida, to a term of thirty (30) months incarceration to be followed by a five (5) year probationary period.

On August 16, 1973, Petitioner filed a Motion to Vacate Plea or in the Alternative Amend Sentence after being advised by United States Board of Parole, "Continue with a Progress Report, November, 1973".

On September 19, 1973, Petitioner in United States District Court, Southern District of Florida, filed an Amended Motion to Vacate Plea or in the Alternative Amend Sentence contending that immediately after filing of Motion to Vacate, Petitioner was moved from a place of confinement in Baltimore, Md., to a Federal penal institution in Montgomery, Ala., in violation of the original plea bargaining agreement.

Evidentiary hearing on the Motion and amended Motion was held November 12-14, 17, 1973 before the

Honorable Joe Eaton, Judge, United States District Court, Southern District of Florida, and on November 20, 1973, Judge Eaton ordered and adjudged that the Motions under Title 28, United States Code, Section 2255, be denied and dismissed with prejudice.

On November 30, 1973, the same Honorable Joe Eaton, Judge, United States District Court, Southern District of Florida afforded some relief as requested by Petitioner in a habeas corpus pleading filed pro se and on December 17, 1973 dismissed a second such pleading on the grounds Petitioner had received rulings on all prayers for relief sought.

On January 22, 1974, Petitioner filed Notice of Appeal to the Order entered November 20, 1973 by Judge Eaton.

On March 25, 1974, United States Court of Appeals for the Fifth Circuit consolidated all of Petitioner's appeals.

REASONS FOR GRANTING WRIT

Petitioner entered a guilty plea to four counts of a multi-count indictment charging violations of numerous sections of Title 18, United States Code. The Court at time of acceptance of such plea openly acknowledged the existance of a plea bargaining agreement entered into between petitioners and representatives of the United States Government both prosecutorial and investigative.

Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510 (1962) established that a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. The United States Govern-

ment at no time during pleadings in this long-standing case has ever contended that Petitioner's plea of guilty was not induced by promises.

Plea bargaining agreement contained inter alia proviso dealing with parole and with type of institution where to be confined. After Petitioner had served approximately 10 months of a thirty month sentence and upon being advised would not be considered for parole until after approximately 13 months of confinement Petitioner filed Motion to Vacate on basis plea had been induced by plea bargain and that the Government had failed to perform as agreed, namely failure to secure parole upon completion of 1/3 of sentence imposed by trial court.

In *Santebello v. New York,* 404 U.S. 257, 92 S.Ct. 495 (1971) this Court stated that a plea induced by a plea bargain which bargain was later broken, entitled the defendant to relief. Petitioner's first motion under Title 28, Section 2255 was based on this very narrow contention, namely, his plea was induced by a plea bargain that was later broken.

2. The Fifth Circuit's holding that because Petitioner was no longer in custody makes issues raised by Petitioner moot is in conflict with a previous decision of the Fifth Circuit rendered in *Reed v. United States,* 471 F.2d 721 (1973), decisions of the Ninth Circuit in *Marshall v. United States,* 465 F.2d 966 (1972) and the Eighth Circuit in *Hupert v. United States,* 448 F.2d 668 (1971), and the decision of this court in *Carafas v. La Valle,* 391 U.S. 234, 88 S.Ct. 1556 (1968).

CONCLUSION

We believe the conflicting view on the issue involved should be resolved by this Honorable Court to avoid an apparent conflict between Circuits, between a previous decision of the same Circuit and between this Court and a lower Court. It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HENRY GONZALEZ
620 Madison Street
Tampa, Florida

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing has been furnished by U.S. Mail on this 6th day of February, 1975 to the United States Attorney, Miami, Florida and to the Solicitor General, Washington, D.C.

HENRY GONZALEZ

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1363-Civ-JE

FINAL JUDGEMENT
MICHAEL ARTHUR STRAUSS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

THIS CAUSE came on for hearing before the Court and the issues having been duly heard, and the Court having orally entered its findings of fact and conclusions of law at the conclusion of the hearing on November 17, 1973, accordingly, it is

ORDERED and ADJUDGED that Petitioner's motion under Title 28, United States Code § 2255 is hereby denied and this cause is hereby dismissed with prejudice.

DONE and ORDERED at Miami, Southern District of Florida this 20 day of November, 1973.

/s/ Joe Eaton

United States District Judge

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1819-Civ-JE

FINAL JUDGMENT
MICHAEL ARTHUR STRAUSS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

Petitioner, Michael Arthur Strauss, has filed in this cause an "application for writ of habeas corpus;" an "application for temporary restraining order;" and an "application for permanent injunction." All applications came on to be heard before this court on November 29th, 1973.

The contents of the various applications establish that Petitioner is not seeking release from custody. Habeas Corpus, therefore, does not lie. The various applications and the proceedings November 29, 1973 establish that Petitioner is seeking to be placed in the "custody of the United States Marshal" under the provisions of the "Federal Witness Protection Act." In short, although he is a prisoner under sentence, he seeks to avoid being placed in the general prison population during his federal confinement for the reason that he says he was promised, prior to sentencing, that he would be placed in some facility near Washington, D.C., which would compare to a protective custody type facility.

The record of the criminal case in chief which underlies this matter, the § 2255 proceeding recently heard by this Court (Case Number 73-1363-Civ-JE) and the record in this cause establish that Petitioner was, in fact, promised that during any commitment arising

from the case in chief and related cases around the country the Government would recommend minimum security confinement for Petitioner. Petitioner was, in fact, confined in a minimum security type facility. Those records also reflect that Petitioner, under the circumstances, should continue to be confined in a minimum security type facility.

Further, Petitioner fears that his life is in danger while he is confined in the prison system. It is the responsibility of the prison authorities to protect the Petitioner from danger while he is incarcerated in the prison system.

Therefore, upon consideration of the applications, the testimony and evidence in this cause and the records in the matters mentioned above, it is

ORDERED and ADJUDGED that:

1. Petitioner, if transferred from the jail facility where he is presently incarcerated in the Southern District of Florida, shall be transferred to a minimum security facility (Federal Prison Camp) within the prison system;

2. In the event the Attorney General of the United States, or his duly authorized agent, considers it necessary thereafter to transfer petitioner from a minimum security type facility, the Attorney General of the United States, or his agent, shall forthwith show good cause for such removal, and the Attorney General of the United States, or his agent, shall forthwith report to this Court in writing the details of the transfer and the reasons necessitating such transfer.

3. The Petitioner's applications are otherwise denied.

4. The Court retains jurisdiction of this cause for the purpose of enforcing the terms of this judgment and for the entry of further orders in reference to the Petitioner's place of confinement.

DONE and ORDERED at Miami, Southern District of Florida this 30 day of November, 1973.

/s/ Joe Eaton

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1847 Civ-JE

ORDER OF DISMISSAL

MICHAEL ARTHUR STRAUSS,

Petitioner,

-v-

ROBERT BORK, Acting United States Attorney General,

Respondent.

On November 30th, 1973, this Court following lengthy hearings denied Petitioner the habeas corpus relief he sought in case number 73-1819-Civ-JE. On December 3, 1973, petitioner filed this, a second petition in habeas corpus seeking the same relief which was denied him by this Court's ruling of November 30th, 1973 in case number 73-1819-Civ-JE. He raises the same grounds here and he adds an allegation that under the circumstances to be confined in a minimum security prison as distinguished from a protected housing facility constitutes cruel and unusual punishment.

In the habeas corpus matter ruled upon by this Court on November 30th, 1973, petitioner also sought temporary and permanent injunctive relief on the same grounds stated in what he says in this case is an alternative application for temporary and permanent restraining order in the event habeas corpus does not lie. In his original injunctive application petitioner sought to be placed in a protected facility for housing government witnesses under what he labeled in that application to be the "Federal Witness Protection Act". Here

he seeks the same relief and properly refers to a certain Congressional Act as the "Organized Crime Control Act of 1970.[1] However, the relief sought in the present application is identical to that sought in the previous application.

The original habeas corpus matter and application for injunctive relief were brought against the United States of America. These are brought against "Robert Bork, Acting United States Atorney General."

This Court's rulings in case number 73-1819-Civ-JE, entered on November 30th, 1973, are res judicata of issues presented in this cause. The res judicata doctrine is grounded on fundamental principles that any controverted matter once finally adjudicated should not be litigated again if between same parties or parties in privity with them. Petitioner has had his day in Court. Petitioner had an opportunity to litigate his claim of cruel and unusual punishment in the prior petition and, in fact, he did so though he did not mention the constitutional provision by name. In any event, under no circumstances did the facts presented in the extensive hearings previously mentioned call into play the constitutional prohibition against cruel and unusual punishment.

In short, petitioner has previously received rulings from this Court on all prayers for relief he seeks here. Therefore, it is

ORDERED and ADJUDGED that this cause is hereby dismissed.

DONE and ORDERED at Miami, Southern District of Florida, this 17 day of December, 1973.

/s/ Joe Eaton

United States District Judge

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[1] The provision referred to by Petitioner vests in the Attorney General of the United States the discretion to provide for the security of government witnesses and potential government witnesses for so long as the Attorney General determines that jeopardy to such persons life continues. It is not authority for the Court to enter such order as petitioner seeks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1112

Summary Calendar*

MICHAEL ARTHUR STRAUSS,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 74-1370

Summary Calendar*

MICHAEL A. STRAUSS,

Petitioner-Appellant,

vs.

ROBERT BORK, Acting U. S. Attorney General,

Respondent-Appellee.

Appeals from the United States District Court for the Southern District of Florida

(December 3, 1974)

Before GEWIN, GODBOLD and CLARK, Circuit Judges.
PER CURIAM:

In these suits, appellant Strauss alleged that his plea bargain agreement had been breached. He claimed that he was promised incarceration in a minimum secur-

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

ity facility with full protection from those against whom he testified. He maintained that he was being transferred to a maximum security prison and was being sent into the general prison population in retaliation for filing a § 2255 petition.

In No. 74-1112, the district court ordered that appellant be retained in a minimum security prison. In No. 74-1370, the district court dismissed Strauss's complaint on the ground that the issue had previously been decided. In response to an inquiry by the Clerk of this Court, the chief of the Major Violations Unit, Fraud Section, Criminal Division of the Department of Justice, informed the Court that appellant Strauss was released from custody on August 9, 1974. It appears that the issues raised by appellant are moot, and therefore, these appeals are dismissed because of mootness.

DISMISSED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1133

MICHAEL A. STRAUSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government failed to comply with a provision of a plea bargaining agreement.

A 78-count indictment returned in the United States District Court for the Southern District of Florida charged petitioner and 21 other individuals with violations of 18 U.S.C. 2, 371, 1341, 1342, 1343 and 2314. Following his plea of guilty to five counts of the indictment, petitioner was sentenced on October 26, 1972, to a term of 30 months' incarceration to be followed by a five-year period of probation.

At the time of his guilty plea, petitioner had entered into a plea bargain with the government that was acknowledged and accepted by the district court. This written agreement provided, *inter alia*:

> Fifth, * * * In any event, the Government will *recommend* that defendant be paroled on all sentences after serving no more than one-third of the sentence imposed by the original trial Court. [Emphasis supplied.]

On August 16, 1973, petitioner filed with the district court a "Motion to Vacate Plea or in the Alternative to Amend Sentence," alleging that the government's failure to *secure* parole for petitioner upon completion of one-third of his sentence constituted a breach of this agreement (Pet. 7). After a full evidentiary hearing, petitioner's motion was denied (Pet. App. A-1). Following that ruling, petitioner filed an application for a writ of habeas corpus with the district court, and he received partial relief.[1] Petitioner's subsequent application for relief was dismissed (Pet. App. A-4 to A-5).

Petitioner appealed all denials to the United States Court of Appeals for the Fifth Circuit, which consolidated the cases on March 25, 1974. In May, 1974, petitioner filed with the court of appeals a motion denominated a "Motion to Amend Original Motion to Vacate Plea Pursuant to 28 U.S.C. 2255, to a Modification of Sentence Only." In this motion, petitioner asked to withdraw his request to vacate his plea and sought as his sole relief a modification of sentence.

On August 9, 1974, petitioner was released on parole. On December 3, 1974, the court of appeals dismissed petitioner's appeals as moot (Pet. App. A-6 to A-7).

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[1]The district court granted petitioner's request that he be incarcerated in a minimum security prison (Pet. App. A-2 to A-3). We have considerable doubt about the court's power to order such relief, but no appeal was taken from the order.

1. The clear and unambiguous language of the plea bargain, which was reduced to writing and signed by respondent, makes plain that the Department of Justice agreed only to *recommend* to the Board of Parole that parole be granted. Petitioner nevertheless contends that his failure to *secure* parole somehow constitutes a breach of the agreement. Such a claim must necessarily fail, for it is not disputed that the Department of Justice has more than fully complied with its agreement to recommend parole.[2] Moreover, the findings of fact made by the district court following a full evidentiary hearing expressly negate any assertion by petitioner that he did not appreciate the difference between a commitment to recommend parole and a guarantee of parole.[3]

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[2]Prior to the Board of Parole taking any action on petitioner's application, the Chief of the Fraud Section of the Criminal Division of the Department of Justice communicated in writing to the Board the Department's recommendation that petitioner be released at or prior to the expiration of one-third of his sentence. When the Board continued Strauss's application pending a progress report in November 1973, the Assistant Attorney General in charge of the Criminal Division petitioned for and obtained from the Board a rehearing concerning petitioner's application for parole and the Department's recommendation that a release date be set. After rehearing was granted, the Chief and Deputy Chief of the Fraud Section personally appeared before the Board of Parole sitting *en banc* and once again recommended parole for petitioner.

[3]The district court found that petitioner, who is a highly educated, intelligent person and was represented by thoroughly competent legal counsel (Tr. 818, 821-822), was never assured by counsel that he would be paroled but simply advised that his chances were great (Tr. 822, 864). Upon the agreement by the government to recommend light sentences (Tr. 851), petitioner was extremely anxious to plead guilty (Tr. 827) and equally happy to have the recommendation for parole (Tr. 822). Petitioner himself, the court found, concluded that his chances of obtaining early parole were 95 percent or better (Tr. 864). His attorney never told him he had a guarantee of parole (Tr. 864), nor did Assistant United States Attorney Tifford directly assure him that parole would be forthcoming (Tr. 863-864). Furthermore, Department of Justice Attorney McTiernan, who directed the final plea bargaining with petitioner, made it clear to petitioner that there was no way the Parole Board could be bound by the prosecutors' recommendation (Tr. 865).

2. The questions presented by petitioner in his request for relief have been rendered moot by his release from custody, as was properly held by the court of appeals (Pet. App. A-6 to A-7). This Court in *Santobello* v. *New York*, 404 U.S. 257, contemplated two possible types of relief if a plea bargain were breached by the government, namely, allowing the withdrawal of the guilty plea, or specific enforcement of the bargain. Because petitioner in this case withdrew his request to vacate his plea, the only alternative is specific performance of the agreement—that is (if we accept petitioner's reading of the agreement), parole. However, since petitioner was released on parole on August 9, 1974, specific performance is no longer necessary or possible, and petitioner's action is therefore moot.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]Petitioner is in error in his contention that the holding of the court of appeals in this case conflicts with *Reed* v. *United States*, 471 F.2d 721 (C.A. 5); *Marshall* v. *United States*, 465 F.2d 966 (C.A. 9); *Hupert* v. *United States*, 448 F.2d 668 (C.A. 8); and *Carafas* v. *LaVallee*, 391 U.S. 234. While those cases support the proposition that claims for some forms of relief are not mooted by release from custody, here the only requested relief was release—a claim which obviously became moot when petitioner was granted parole.